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No. 316

IN THE

# Supreme Court of the United States

REUBEN CAPELOUTO,

Appellant,

vs.

ORKIN EXTERMINATING COMPANY OF FLORIDA, INC., a Florida corporation,

Appellee.

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## PETITION FOR REHEARING

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Attorneys for Appellant

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This Court, by its order of October 10, 1966, dismissed the appeal in the above-styled cause for the stated reason that no substantial federal question was involved.

Appellant petitions for rehearing of this appeal pursuant to Rule 58 of this Court.

This Court has been severely criticized, most particularly in the general area from which this appeal comes, for its concern for the individual rights guaranteed to every citizen by the United States Constitution. To now state that there is no substantial federal question involved in a case where one of the most sacred and fundamental of individual rights is involved, the right to earn a living in a lawful business or profession, is totally out of keeping with the previous decisions of this Court. It must be respectfully submitted that it is also out of keeping with the decisions of the Florida Supreme Court on this same philosophical question. The Supreme Court of Florida, more than 20 years ago, in the case of **State v. State Board of Administration,** 25 So. 2d 880, stated the rule in the following language:

> "The major question is one that concerns the general welfare, and, when that is the case, constitutional questions should be approached from the pragmatic rather than the legalistic point of view. Courts can do this and not transgress the bounds of constitutional framework. The Constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to bind like a strait-jacket but contemplated experimentation for the common good. When it was promulgated, its sponsors thought it the embodiment of the common concept of right and a practical means of insuring justice. Interpreted with these precepts to guide us, we arrive at correct judgments that can be enforced with

the minimum of coercion. Not only that, we dispel the charge that the Constitutional interpretation is an expression of judicial prejudices or of the judges' social and economic theories. The question here involves new complexes that must be thought through in the light of the purpose designed to be accomplished and not in the light of outworn dogmas that do nothing more than throw our means of administering justice into a stalemate."

The statute upheld by the court below (Section 542.12, Florida Statutes) condemns contracts under which persons are restrained from pursuing a lawful profession, trade or business, with two paragraphs of exceptions. One relates to partners and is not involved here, and the other excludes from the statutory prohibition three categories of contracts: (1) those who sell the good will of a business; (2) shareholders who sell all their stock in corporations; (3) employees or agents. The Florida Supreme Court, in its decision in **Capelouto v. Orkin Exterminating Company of Florida,** 183 So. 2d 532, admitted that the application of the statute to employees had not been, prior to this litigation, passed by that court. The Florida court's previous decision of **Standard Newspapers v. Woods,** 110 So. 2d 397, merely upheld the validity of the statute as it related to the sale of the stock of a corporation. The court then, in two paragraphs taking less than one-fourth of a page in the reported volume, extended the previous decisions to include the appellant in the following language:

"[1] As was pointed out in our opinion in Standard Newspapers, supra, under the common law, contracts restricting a man's right to follow his calling were considered void. But the reasons which supported the common law view have long since disappeared. In any event, there can be no doubt that the legislature of our state has the power to enact legislation superseding the common law as it did by enactment of Section 542.12, and more specifically by the enactment of subsections (2) and (3) thereof.

"[2,3] Appellant argues that the statute is invalid as denying him equal protection and due process of law, but he offers no convincing authority in support. There has been no showing of invalidity sufficient to overcome the presumption of validity which we must indulge in favor of every properly enacted statute. Kass v. Lewin, Fla. 1958, 104 So. 2d 572. We therefore hold subsection (2) of Section 542.12 as applied to such contracts between an employee and an employer to be constitutional."

It is respectfully submitted that the statute's application to the appellant can be clearly distinguished from its application to the sale of a business or stock. When one sells the good will of a business or when shareholders sell all of their stock in corporations, the contract is entered into and is immediately effective. The parties engage in an arms-length transaction and are intimately familiar with the effect that it will have upon their future conduct. Examine, if

you will, the differences between this and the effect that the statute has on employees such as the appellant. A contract was first entered into between the appellant and the appellee on August 1, 1949 (Jurisdictional Statement, page 6) and the contract of employment was terminated on May 1, 1964. How could any employee in 1949 anticipate the effect which his contract would have upon his ability to earn a livelihood in 1964? To equate this situation to one where parties enter into a contract to sell a business or its stock or its good will, which contract is effective immediately, is totally unreasonable. Examine the effect of the rule of the court below on the appellant and all others similarly situated. As a condition of employment, the employer may require him to enter into a contract in perpetuity which will prohibit him from engaging in competition with the employer for a reasonable time (here, two years) and in a reasonable area (here, 15 or 16 counties in North and Northwest Florida). Sixteen years from now, if the employee, regardless of reasons desires to sever his relationship with the employer, he is required to do one of two things. One, either remove his family from his residence of 16 years, disrupting his childrens' education; or, two, engage in some new business in which he has no training or experience. To state the rule as it affects the appellant is to show the substantial federal question involved.

At the date that decree was entered (on January 11, 1965), Orkin was engaged in structural pest control, as distinguished from lawn and ornamental pest

control. Structural pest control is, as its very name implies, related to the control of pests in buildings; lawn and ornamental pest control relates to the control of tree, grass and shrubbery pests.

The record confirms that the subject matter of the contract in dispute related to employment in the structural pest control field and to an agreement on the part of appellant not to compete in structural pest control.

The injunction follows the wording of the contract and restrains appellant from competing with appellee "in the pest control business or any business engaged in the eradication and control of" pests (Jurisdictional Statement, App. 27) and from "servicing contracts . . . himself or in conjunction with any other . . . selling **any kind of pest control service.**" (Id., App. 28; emphasis supplied). As noted, this effectively and implicitly prevents appellant from engaging in lawn and ornamental pest control even though appellee, his employer, did not hold itself out as being in that type of activity in the area convered by the contract.

The law of Florida on the date of the injunctive decree was entitled "Structural Pest Control Act" (Chapter 482, Florida Statutes). There was no attempt to license or regulate lawn or ornamental pest control operators. The 1965 Florida Legislature, however, subsequent to the entry of the decree, amended that act so as to embrace lawn and ornamental pest control, as well as structural pest control. Consequent-

ly, the contract and the final decree are susceptible of being construed as restraining appellant from engaging in lawn and ornamental pest control, although such was not contemplated by the parties as being within the covenant not to compete.

The question here is one of an individual right—the right to earn a lawful living for oneself and his family. The charge is that the contract, its construction (both actual and that to which it is susceptible) and the application of the statute and the decree of the state court to this appellant infringe upon the constitutional guaranty. In the language of the Florida Supreme Court, this constitutional question should be approached from the pragmatic rather than the legalistic view. The right to earn a living in a business or profession of the individual's choosing is basic to the preservation of the other rights so jealously guarded by this Court; i.e., the right to vote, to counsel, to freedom from unreasonable search and seizure. Without the unfettered right to earn a livelihood, the others have no meaning.

The two reasons given by the Florida court for upholding the statute, (1) the reasons for the common law rule voiding contracts restricting a man's right to follow his chosen profession having long since disappeared, and (2) there was no convincing authority and no showing of invalidity sufficient to overcome the presumption of validity which is indulged in favor of every properly enacted statute, sound hollow indeed when the right taken away is as basic and fundamental as herein involved.

Respectfully submitted,

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Attorneys for Appellant

## CERTIFICATE OF GOOD FAITH

I HEREBY CERTIFY that the foregoing Petition for Rehearing is filed in good faith and not for delay.

WILFRED C. VARN
Attorney for Appellant
and a Member of the Bar
of the Supreme Court of
the United States.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Honorable J. Lewis Hall, of Hall, Hartwell, Hall & Canada, counsel of record for appellee, at the office of said counsel, Midyette-Moor Building, Tallahassee, Florida, this _____ day of November, 1966.

Attorney for Appellant
and a Member of the Bar
of the Supreme Court of
the United States.

END